

December 14, 2004

Barbara A. Schermerhorn
ClerkNOT FOR PUBLICATION**UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE TENTH CIRCUIT**

IN RE CONNIE ANN SEIWERT,
Debtor.

BAP No. KS-04-016

EDUCATIONAL CREDIT
MANAGEMENT CORPORATION,

Bankr. No. 96-43032-13
Chapter 13

Appellant,

v.

ORDER AND JUDGMENT*

CONNIE ANN SEIWERT,
Appellee.

Appeal from the United States Bankruptcy Court
for the District of Kansas

Before CORNISH, MICHAEL, and THURMAN, Bankruptcy Judges.

CORNISH, Bankruptcy Judge.

Educational Credit Management Corporation (ECMC) timely appeals a final Judgment entered by the United States Bankruptcy Court for the District of Kansas declaring, in relevant part, certain portions of the debtor's student loan debt to be discharged pursuant to a provision in her confirmed Chapter 13 Plan.¹ The parties have consented to this Court's jurisdiction because they have not elected to have the appeal heard by the United States District Court for the

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. 10th Cir. BAP L.R. 8018-6(a).

¹ 28 U.S.C. § 158(a)(1); Fed. R. Bankr. P. 8002(a).

District of Kansas.² For the reasons stated below, the portion of the bankruptcy court's Judgment declaring the student loan debt to be discharged is REVERSED.

I. Background

The debtor filed a Chapter 13 petition in 1996. She scheduled ECMC's predecessor in interest (who will be referred to as "ECMC") as a creditor holding a general unsecured claim for unpaid student loans in the total amount of \$22,000.

The Chapter 13 plan proposed by the debtor stated, in relevant part, that:

SPECIAL CLASS CREDITORS (Designate total for class and % to pay)
Student Loan Creditors _____ \$ 22,000 _____ 100%__

. . . .

**THE PROVISIONS OF THIS PLAN ALTER CONTRACTS AND
LEGAL RELATIONSHIPS PREVIOUSLY EXISTING.
PERSONS AFFECTED ARE ADVISED TO SEEK LEGAL
ADVICE IF THEY DO NOT AGREE OR DO NOT
UNDERSTAND THE PROVISIONS OF THIS WHOLE PLAN.**

. . . .

Student Loan creditors will be paid the remaining unpaid original principal amount of any claim next from any funds paid the trustee during the plan. During the pendency of the Bankruptcy Proceeding, no interest or penalties will accrue on these debts or claims. All such debts other than the remaining unpaid original principal amount of the loans remaining unpaid upon completion of the plan will be discharged upon entry of any discharge[] hereunder.³

Accordingly, through this provision, the debtor proposed to discharge prepetition interest on her student loans, and any interest or penalties that accrued on that debt during her Chapter 13 case (collectively, "Interest").

While confirmation of this Plan was pending, ECMC filed a proof claim in the debtor's case, asserting a claim with a principal balance of \$26,259.39, and prepetition interest of almost \$3,000. The Chapter 13 trustee objected to ECMC's proof of claim, arguing that "PER PLAN ONLY ORIGINAL PRINCIPAL

² 28 U.S.C. § 158(b)-(c); Fed. R. Bankr. P. 8001(e).

³ Chapter 13 Plan at 2, Appellant's Appendix at 198.

AMOUNT TO BE PAID” (Claim Objection).⁴ ECMC did not respond to the Claim Objection.

While the Claim Objection was pending, a hearing on the confirmation of the debtor’s Plan was held. Despite the debtor’s proposal to discharge the student loan Interest through the confirmation of her Plan, not by a judgment pursuant to 11 U.S.C. § 523(a)(8),⁵ ECMC did not object to confirmation of the Plan. In May, 1997, the bankruptcy court entered an Order confirming the debtor’s proposed Plan (Confirmation Order). ECMC did not appeal the Confirmation Order.

After the Confirmation Order was entered, the bankruptcy court entered an Order sustaining the unopposed Claim Objection (Claim Order). The Claim Order states that ECMC’s claim is allowed as a “SPCL CLASS-UNSECURED claim in the amount of \$22,000,” with an unsecured claim in the amount of \$7,028.76.⁶ ECMC did not appeal the Claim Order.

Several years later, the debtor completed payments under her confirmed Plan, including payments to ECMC totaling \$22,000. As a result, in May, 2002, the bankruptcy court entered a “Discharge Order,” granting the debtor a discharge pursuant to § 1328(a). Contrary to her confirmed Plan, the Discharge Order excepts the debtor’s entire student loan debt from discharge. In July, 2002, a Final Decree was entered, and the debtor’s Chapter 13 case was closed.

Almost one year after her case was closed, the debtor was notified that

⁴ Claim Objection at 1, Appellant’s Appendix at 209.

⁵ All future statutory references in the text are to title 11 of the United States Code. Section 523(a)(8) states that student loan debt is excepted from discharge, unless doing so “will impose an undue hardship on the debtor and the debtor’s dependents.” 11 U.S.C. § 523(a)(8); *see* Fed. R. Bankr. P. 4007(a)-(b) & 7001(6) (adversary proceeding necessary to determine the dischargeability of a debt, and the debtor may file a complaint to commence such a proceeding at any time).

⁶ Claim Order at 1, Appellant’s Appendix at 210.

ECMC would offset a government payment to which she was entitled against her unpaid student loan debt. The debtor allegedly owed approximately \$4,000.00 in principal (Principal Debt),⁷ plus the Interest. In response, the debtor filed an “Application for Citation in Contempt,” alleging that ECMC had violated the discharge injunction by attempting to collect the discharged student loan debt (Contempt Motion). The bankruptcy court reopened the debtor’s Chapter 13 case and issued an Order to Show Cause (OSC), requiring ECMC to appear.

ECMC responded to the debtor’s Contempt Motion and the OSC, alleging that the Discharge Order excepted the entire student loan debt from discharge. It maintained that the conflicting Confirmation Order, purporting to discharge otherwise nondischargeable Interest on the debtor’s student loan debt, was void because the debtor had not commenced an adversary proceeding against it to obtain a determination of “undue hardship” under § 523(a)(8). It also argued that, even if the Confirmation Order served to discharge student loan debt, the discharge extended only to the Interest, not the Principal Debt.

The bankruptcy court entered a Judgment in favor of ECMC in part, and in favor of the debtor in part. It denied the debtor’s Contempt Motion because the Principal Debt had not been discharged under the terms of the debtor’s confirmed Plan and, therefore, the debtor was required to pay ECMC that Debt, plus post-discharge interest. However, ECMC was barred from collecting the Interest because it had been discharged pursuant to the terms of her confirmed Plan.

The bankruptcy court’s Judgment is supported by separate findings of fact

⁷ The debtor had paid ECMC \$22,000 through her Plan, but ECMC asserted in its proof of claim that the principal debt was over \$26,000. While ECMC’s claim for principal in excess of \$22,000 was disallowed in the debtor’s Chapter 13 case by the Claim Order, the nondischargeable debt in excess of \$22,000 survived the Chapter 13 case.

and conclusions of law, set forth in a Memorandum and Order.⁸ The bankruptcy court relied on *Andersen v. UNIPAC-NEBHELP (In re Andersen)*,⁹ in concluding that the student loan Interest was discharged, even though a § 523(a)(8) proceeding had not been commenced against ECMC. Specifically, it held that ECMC could not collaterally attack the final Confirmation Order that discharged the Interest when the debtor completed her Plan payments. It also stated that the contrary Discharge Order did not compel a different result, and denied “ECMC’s request to enforce” the Discharge Order.¹⁰

ECMC timely appealed the bankruptcy court’s Judgment, asserting that it erred in discharging the student loan Interest.¹¹ The debtor did not cross appeal the portion of the Judgment denying her Contempt Motion and, therefore, this Court has no jurisdiction over that portion of the Judgment. Accordingly, the only issue before us is whether the bankruptcy court erred in discharging the

⁸ *Educ. Credit Mgmt. Corp. v. Boyer (In re Boyer)*, 305 B.R. 42 (Bankr. D. Kan. 2004). This Memorandum and Order contains findings of fact and conclusions of law related to the Judgment entered in the debtor’s case, captioned above, as well the Judgments entered in three other Chapter 13 cases involving the similar facts and issues. *Educ. Credit Mgmt. Corp. v. Boyer (In re Boyer)*, Bankr. No. 96-42993-13, Adv. No. 02-7141 (Bankr. D. Kan.); *Educ. Credit Mgmt. Corp. v. Nelson (In re Nelson)*, Bankr. No. 98-41327-13, Adv. No. 03-7025 (Bankr. D. Kan.); *In re Mersmann*, Bankr. No. 98-41940-13 (Bankr. D. Kan.) [hereinafter referred to collectively as the “Related Debtor Cases”].

⁹ 179 F.3d 1253 (10th Cir. 1999).

¹⁰ *Boyer*, 305 B.R. at 55.

¹¹ ECMC also appealed the Judgment entered by the bankruptcy court in each of the Related Debtor Cases. The bankruptcy court’s Judgment in two of the Related Debtor Cases is reversed for the same reasons stated in this Order and Judgment. *Educ. Credit Mgmt. Corp. v. Boyer (In re Boyer)*, BAP No. KS-04-015 (10th Cir. BAP filed Dec. 14, 2004); *Educ. Credit Mgmt. Corp. v. Nelson (In re Nelson)*, ___ B.R. ___, BAP No. KS-04-017 (10th Cir. BAP filed Dec. 14, 2004). In the third Related Debtor Case, *In re Mersmann*, we have entered an Opinion affirming the bankruptcy court’s Judgment. ___ B.R. ___, BAP No. KS-018 (10th Cir. BAP filed Dec. 14, 2004). Unlike this debtor’s case or the other two Related Debtor Cases, the discharge clause in the confirmed plan in *Mersmann* contained a “finding of undue hardship” and, therefore, under *Andersen*, 179 F.3d at 1256, that finding was binding on ECMC. See *Poland v. Educ. Credit Mgmt. Corp. (In re Poland)*, 382 F.3d 1185, 1189 (10th Cir. 2004) & discussion *infra*.

student loan Interest pursuant to the terms of the debtor's confirmed Plan.

II. Discussion

For the same reasons stated in *Educational Credit Management Corp. v. Nelson (In re Nelson)*,¹² the portion of the bankruptcy court's Judgment declaring the student loan Interest to be discharged pursuant to the debtor's confirmed Plan must be reversed in light of *Poland v. Educational Credit Management Corp. (In re Poland)*.¹³ The debtor's Plan contains no "finding of undue hardship" and, therefore, it does not discharge the student loan Interest.¹⁴ There being no adjudication of undue hardship binding ECMC, the debtor can only obtain a discharge of her student loan debt by commencing an adversary proceeding against ECMC under § 523(a)(8), and proving that payment of the debt will impose an "undue hardship" on her and her dependents.¹⁵

III. Conclusion

The portion of the bankruptcy court's Judgment declaring the student loan Interest to be discharged is REVERSED.

¹² ___ B.R. ___, BAP No. KS-04-017, Slip Op. at 5-8; *accord Boyer*, BAP No. KS-04-015, Slip Op. at 6-8.

¹³ 382 F.3d 1185 (10th Cir. 2004).

¹⁴ The Discharge Order excepts the debtor's entire student loan debt from discharge. The bankruptcy court, holding that the Interest was discharged under the confirmed Plan, refused to enforce the Discharge Order as to the Interest. It did not, however, alter the Discharge Order. Accordingly, the Discharge Order now conforms to our holding that the Interest, as well as the Principal Debt, is excepted from discharge.

¹⁵ 11 U.S.C. § 523(a)(8); Fed. R. Bankr. P. 4007(a)-(b) & 7001(6); *Poland*, 382 F.3d at 1189 (adversary proceeding required, and debtor has burden to prove "undue hardship"); *Andersen*, 179 F.3d at 1256 (same); *Mersmann*, ___ B.R. ___, BAP No. KS-04-018, Slip Op. at 5-6, (same); *see generally Educ. Credit Mgmt. Corp. v. Polleys (In re Polleys)*, 356 F.3d 1302 (10th Cir. 2004) (discussing elements of "undue hardship"); *In re Woodcock*, 45 F.3d 363 (10th Cir. 1995) (debtor has burden to prove "undue hardship"); *Alderete v. Educ. Credit Mgmt. Corp. (In re Alderete)*, 308 B.R. 495 (10th Cir. BAP 2004) (discussing elements of "undue hardship," and debtor has burden of showing by preponderance of the evidence).